Supreme Court, U. S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-1350

JOSEPH J. GARIBALDI, LEO S. GARIBALDI
and LEONA D. GARIBALDI,
Petitioners,

vs.

EDITH CANVIN, as Administratrix of the Estate
of Theresa Garibaldi, Deceased, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the Court of Appeal of the State of California
Third Appellate District

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INTRODUCTION

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, Third Appellate District, entered on January 5, 1977.

OPINION BELOW

The opinion of the Court of Appeal of the State of California, Third Appellate District, is printed in Appendix "A" hereto and is not reported in the official reports.

JURISDICTION

The judgment, printed in Appendix "A" hereto, which is sought to be reviewed is dated January 5, 1977 and was filed on that same date.

A rehearing by the Court of Appeal of the State of California, Third Appellate District, was denied on January 25, 1977 (Appendix "C" hereto). A hearing in the California Supreme Court was denied on March 3, 1977 (Appendix "D" hereto).

The jurisdiction of this court is invoked under Section 1257(3) of Title 28 of the United States Code.

QUESTIONS PRESENTED

(1) Were Petitioners deprived of their property without due process of law and denied the equal protection of the laws where the Court of Appeal of the State of California, Third Appellate District, refused to decide the issue raised by Petitioners on their appeal, to-wit: that the attorney for the Respondent Garibaldis perpetrated a fraud upon the probate court and these Petitioners and thereby acquired legal title to real property for his clients, i.e., the Respondent Garibaldis, which was rightfully vested in Petitioners?

CONSTITUTIONAL PROVISIONS INVOLVED

Federal Constitution:

"Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S.C.A. Const. Amend. XIV §1, 33." (Only Section 1 is deemed pertinent to this issue)

California Constitution, Article 6, §4b:

"The District Courts of Appeal shall have appellate jurisdiction on appeal from the superior courts (except in cases in which appellate jurisdiction is given to the Supreme Court) in all cases at law in which the superior courts are given original jurisdiction; also, in all cases of forcible or unlawful entry or detainer (except such as arise in municipal, or in justices' or other inferior courts); in proceedings in insolvency; in actions to prevent or abate a nuisance; in proceedings of mandamus, certiorari, prohibition, usurpation of office, removal from office, contesting elections, eminent domain, and in such other special proceedings as may be provided by law; also, on questions of law alone, in all criminal cases prosecuted by indictment or information, except where judgment of death has been rendered.

"The said courts shall also have appellate jurisdiction in all cases, matters, and proceedings

pending before the Supreme Court which shall be ordered by the Supreme Court to be transferred to a District Court of Appeal for hearing and decision. The said courts shall also have power to issue writs of mandamus, certiorari, prohibition and habeas corpus, and all other writs necessary or proper to the complete exercise of their appellate jurisdiction. Each of the justices thereof shall have power to issue writs of habeas corpus to any part of his appellate district upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or the District Court of Appeal of his district, or before any superior court within his district, or before any judge thereof."

STATUTES INVOLVED

California Civil Code §2330:

"An agent represents his principal for all purposes within the scope of his actual or ostensible authority, and all the rights and liabilities which would accrue to the agent from transactions within such limit, if they had been entered into on his own account, accrue to the principal."

California Civil Code §2338:

"PRINCIPAL'S RESPONSIBILITY FOR AGENT'S NEGLIGENCE OR OMISSION. Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by each agent in and as a part of the transaction of such business, and for

his willful omission to fulfill the obligations of the principal."

STATEMENT OF CASE

Petitioners commenced an action in the trial court to impose a constructive trust on certain real property which Respondent Garibaldis (Henry J. Garibaldi, Edith Canvin, Elvira Levaggi, Raymond Garibaldi and Clarence Garibaldi) obtained by a probate court decree. In that action, Petitioners maintained that J. Calvert Snyder, acting in his dual capacity as attorney for the Estate of Theresa Garibaldi and as attorney for Respondent Garibaldis, perpetrated a fraud upon the probate court and these Petitioners when he misrepresented the nature of, and the parties to, a certain Memorandum of Agreement, dated October 22, 1962. By reason of Snyder's fraudulent representations, Petitioners contended, the probate court erroneously believed that the agreement related in part to property which was properly included in the estate when, in fact, the estate, as a party to the agreement, waived any claim which it might have to said property. As a result, Petitioners submitted that the probate court erroneously assumed jurisdiction to construe and enforce the terms of that agreement. Secondly, Petitioners maintained that Respondent Garibaldis thereby acquired legal title to property to which they were not entitled because of their attorney's fraudulent conduct. The trial court found that J. Calvert Snyder and the Respondent

Garibaldis were not guilty of fraud. Petitioners took an appeal from that determination.

In affirming the trial court's judgment, the Third Appellate District, speaking through Justice Evans, did not decide the pivotal issue which Petitioners presented to that tribunal. The court recognized the fact that J. Calvert Snyder was the attorney for the administratrix and the five Garibaldi respondents. (See Appendix "A", page viii, lines 19-20) The appellate court also recognized the fact that J. Calvert Snyder's conduct may have constituted fraud. (See Appendix "A", page xvi, lines 24-26) However, the appellate court did not confront the question of whether or not there was substantial evidence in the record to support the trial court's finding that J. Calvert Snyder was not guilty of fraud. The court sidestepped this issue, stating that such a determination was unnecessary in view of the fact that there was no evidence in the record to indicate that the administratrix of the estate of Theresa Garibaldi or the Respondent Garibaldis, apart from the conduct of their attorney, personally perpetrated any fraud upon, or made any misrepresentation to, the probate court. In regard to the conduct of J. Calvert Snyder, the appellate court said on page xvi of its opinion:

> "Without recitation of other excerpts from the record of inconsistent statements made by Snyder to various courts on the intent and meaning of the agreement, suffice it to say that his acts and conduct are more than puzzling . . .
>
> ". . . The actions of Snyder may or may not constitute fraud upon which an order for compensatory damages could rest."

However, despite Snyder's conduct, the court concluded:

> "Our review of the record, however, fails to reveal fraud or misrepresentations perpetrated or made by the heirs of Theresa, or by the administratrix in her representative capacity. Under such circumstances, imposition of a constructive trust on the estate property distributed by a valid decree of distribution is not appropriate." (Opinion, p. xvi)

Thus, the appellate court in effect held that, although Respondent Garibaldis may have obtained property through the wrongful conduct of their attorney, a constructive trust could not be imposed upon that property in favor of those defrauded because Respondent Garibaldis did not personally perpetrate that fraud.

In their Petition for Rehearing to the Third Appellate District, attached hereto as Appendix "B", Petitioners contended that they had a right to have the appellate court rule on the question of the attorney's fraudulent conduct. (See Appendix "B", page xxiv, lines 17-32; page xxxiv, lines 15-18) Specifically, they maintained that, if the attorney's conduct amounted to fraud, such fraud was imputed to his clients by reason of established California case and statutory law. Hence, Petitioners were necessarily entitled to the relief which they sought, i.e., the imposition of a constructive trust on the real property which Respondent Garibaldis obtained by reason of their attorney's fraud. The appellate court denied the Petition for Rehearing on January 25, 1977. A copy of that decision is attached hereto as Appendix "C".

REASONS FOR ALLOWANCE OF WRIT

The guarantees of the Fourteenth Amendment to the Federal Constitution provide that the States are forbidden to deny any person within their jurisdiction the equal protection of the laws and that no person shall "be deprived of life, liberty or property without due process of law." These guarantees are binding on the judicial branches of a state government. Where the judgment of a state court is grossly and obviously in error and is in clear conflict with those fundamental principles which have been established for the protection and enforcement of private rights, the equal protection and due process clauses of the Federal Constitution enable the United States Supreme Court to review that state court judgment. *Roberts v. New York,* 295 U.S. 264, 79 L.Ed. 1429, 55 S.Ct. 689; *American R. Exp. Co. v. Kentucky,* 273 U.S. 269, 71 L.Ed. 639, 47 S.Ct. 353; *Corrigan v. Buckley,* 271 U.S. 323, 70 L.Ed. 969, 46 S.Ct. 521; *West v. Louisiana,* 194 U.S. 258, 48 L.Ed. 965, 24 S.Ct. 650; *Ladner v. Siegel,* 298 Pa. 487, 148 A. 699, 68 A.L.R. 1172.

Under California law, Petitioners have a constitutionally guaranteed right of appeal in all litigated matters within the express jurisdiction of the appellate court. *In re Sutter-Butte By-Pass Assessment No. 6* (1923) 190 Cal. 532, 213 P. 974, 975; *Pacific Telephone, etc., Co. v. Eshleman* (1913) 166 Cal. 640, 690, 137 P. 1119, 1138; California Constitution, Article 6, Section 4b; 4 Cal.Jur.3d 134, Appellate Review, §90. In the instant case, Petitioners' cause of action

in the trial court was based upon the fact that the Respondent Garibaldis, by reason of the fraudulent conduct of their attorney and agent, were themselves responsible for such fraudulent conduct. Petitioners' appeal to the Third Appellate District Court was premised upon the same legal principle. That legal principle, as it stood at the time of trial and as it now exists in California, provides that the fraudulent acts of an agent are imputed to his principal where the defrauded party seeks to impose a constructive trust on the property which the principal has acquired through his agent's fraud. *M.G. Chamberlain & Co. v. Simpson* (1959) 173 Cal.App.2d 263, 343 P.2d 438; *Eamoe v. Big Bear Land & Water Co.* (1950) 98 Cal.App.2d 370, 220 P.2d 408; *Wells Fargo Bank & Union Trust Co. v. Dowd* (1956) 139 Cal. App.2d 561, 294 P.2d 159; *Duarte v. Postal Union Life Insurance Co.* (1946) 75 Cal.App.2d 557, 171 P.2d 574; *Ghiglione v. American Trust Co.* (1942) 49 Cal.App.2d 633, 122 P.2d 301; *Brown v. Oxtoby* (1941) 45 Cal.App.2d 702, 114 P.2d 622; *Worthen v. Jackson* (1958) 139 Cal.App.2d 615, 293 P.2d 797. That rule is codified in §§2330 and 2338 of the California Civil Code.

By reason of this constitutionally guaranteed right of appeal, Petitioners were entitled, pursuant to the due process clause of the Federal Constitution, to have the Third Appellate District Court review their claim of error on the part of the trial court. They were entitled to have the appellate court rule on the issue of whether there was any substantial evidence in

the record to support the trial court's finding that J. Calvert Snyder did not perpetrate any fraud. Petitioners possessed such a right because, if J. Calvert Snyder's conduct could only be characterized as fraudulent, that conduct would necessarily be imputed to his clients, the Respondent Garibaldis. Thus, Petitioners would be entitled to an order of the trial court imposing a constructive trust on the property which the Respondent Garibaldis obtained through their attorney's fraud.

The Third Appellate District Court, in affirming the trial court's judgment, did not hold that the attorney, J. Calvert Snyder, was innocent of fraud. The appellate court did not conclude that there was any substantial evidence to support the trial court's judgment in this regard. Instead, the Third Appellate District Court held that it was unnecessary to decide the issue which formed the basis of Petitioners' cause of action and their appeal because Petitioners did not show that Respondent Garibaldis personally perpetrated any fraud. Thus, contrary to established California law, which still remains intact, the appellate court, in effect, held that an agent's fraudulent acts are not imputed to his principal who has derived a benefit by reason of that fraudulent conduct.

Such a holding is in error which is gross and obvious and amounts to an arbitrary and capricious exercise of power. Petitioners are entitled to have the California appellate court decide whether the attorney's conduct can only be characterized as fraudulent because, if so decided, Petitioners would be

entitled to have a constructive trust imposed on the property which Respondent Garibaldis obtained. The failure of the Third Appellate District to review the issue of whether substantial evidence existed to support the trial court's finding that the attorney was not guilty of fraud amounts to a denial of due process of law; while the failure to follow established California law which provides that an agent's acts are imputed to his principal for the purpose of imposing a constructive trust constitutes a denial of the equal protection of the laws.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated, Reno, Nevada,
April 1, 1977.

Respectfully submitted,
JOHN C. BARTLETT,
JAMES S. BEASLEY,
VARGAS, BARTLETT & DIXON,
Counsel for Petitioners.

(Appendices Follow)

APPENDICES

Appendix "A"

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

In the Court of Appeal
State of California
Third Appellate District
(Amador)

3 Civil 15956

Joseph J. Garibaldi, Leo E. Garibaldi and Leona D. Garibaldi, Plaintiffs and Appellants, vs. Edith Canvin, as Administratrix of the Estate of Theresa Garibaldi, Deceased; Edith Canvin, individually, Henry J. Garibaldi, Clarence Garibaldi, Raymond Garibaldi, Elvira Levaggi, James S. De Martini and J. Calvert Snyder, Defendants and Respondents.	(Super. Ct. No. 7767)
Henry J. Garibaldi, Edith Canvin, Elvira Levaggi, Raymond Garibaldi, and Clarence Garibaldi, Plaintiffs and Respondents, vs. Samuel D. Robinson, et al., Defendants, Joseph J. Garibaldi, Leo E. Garibaldi and Leona D. Garibaldi, Intervenors and Appellants.	(Super. Ct. No. 8468)

[Filed Jan. 5, 1977]

OPINION

This proceeding is a continuation of a property dispute between two warring factions of the heirs of Theresa Garibaldi. Theresa died in 1956, and her eight children have since been embroiled in what appears to be a continuing gusher of bitter litigation over her property.

In the second of two prior appeals, this court, in an unpublished opinion (3 Civ. 12727) filed August 11, 1972, narrated the pertinent factual background. It is here apropos and we quote:

"FACTUAL BACKGROUND

"Upon the death of Theresa Garibaldi, appellants sought probate of a holographic document claimed to be her will. Respondents filed a contest and on December 12, 1958 the instrument was denied probate upon a finding of undue influence by appellants. The judgment rejecting the purported will was affirmed on appeal. (Estate of Garibaldi (1961) 57 Cal.2d 108.)

"On January 7, 1959, approximately a month after the trial court had denied probate of the will, and pending appeal of that judgment, Edith Canvin, one of the five respondents, was appointed administratrix of decedent's estate (Action No. 3677). Meanwhile, on January 2, 1958 there had been recorded a 1949 deed, executed by the decedent, purporting to convey all her real and personal property[1] to the three appellants as joint tenants." Footnote 1 provides, "The total property had an aggregate value of approximately $700,000, consisting of three parcels of real property known as the Home Ranch, the River

Ranch, and the Mountain Properties, and cattle, bank accounts and other miscellaneous personal property."

"On January 20, 1959 the administratrix, confronted with the 1949 deed executed by decedent in favor of appellants, filed suit (Action No. 6071) against appellants in the Superior Court of Amador County alleging fraud and undue influence by appellants and seeking cancellation of the 1949 deed and the imposition of a constructive trust on the property for the benefit of decedent's estate.

"Action No. 6071 went to trial commencing September 17, 1962. After several weeks of trial, appellants and respondents executed on October 22, 1962 a memorandum of agreement (hereinafter the 'Agreement') whereby the eight heirs agreed to a plan of division and distribution of the property that was being litigated in the action. The Agreement provided that appellants would receive the Home Ranch, the River Ranch, all monies in the bank accounts, the cattle, stocks, bonds, securities, and all furnishings and equipment located on the Home Ranch. Respondents were to receive the Mountain Properties (subject to reservation of a life interest in a parcel thereof to appellant Leo Garibaldi).

"Although the Agreement recited the heirs' intent to settle the controversy being litigated in Action No. 6071 and to dispose of the properties the subject of the 1949 deed in accordance with the provisions of the Agreement, the trial of the action continued, and on November 19, 1962 the case was submitted for decision on briefs.

"On March 15, 1963 the administratrix moved to set aside the order of submission and to permit introduction of the Agreement as part of the record in Action No. 6071. On June 18, 1963 the superior court denied the motion to reopen and rendered its decision in the case. After expressing its opinion that decedent and the three appellants had, during decedent's lifetime, formed an oral partnership in all the 'ranches and cattle raising operations,' the court concluded that the 1949 deed was valid and had been effectively delivered without any improper procurement by appellants; found that the intent of the 1949 deed was to convey title to the properties in trust for a partnership composed of the three appellants and the decedent-grantor; that the three surviving partners (appellants) therefore owned an undivided three-quarters of the properties; and that the remaining one-quarter was vested in the estate of decedent. Judgment was duly entered July 28, 1964 and no appeal was taken therefrom.[2]" Footnote 2 provides, "The trial judge concluded his opinion with the following comment regarding the Agreement which the heirs had executed: 'Before closing this memorandum of opinion, the Court wishes to say that in connection with the motion to reopen the case which . . . is this day being denied, the Court has had occasion to examine an agreement in which the parties and their attorneys herein sought to settle this entire controversy by a division of the properties and bank accounts in question between the parties to this action. To the Court the agreement looks to be a very commendable one and it has no hesitation in recommending that it be carried out and any further expense or controversy herein be settled at once and for all time.'"

"On May 5, 1966 the administratrix filed in Action 3677 a petition for instructions and directions, pursuant to Probate Code sections 588 and 1020.1, seeking validation of the 1962 Agreement as a contract among the heirs which would control disposition of the disputed property as against the judgment (to the extent it was inconsistent with the terms of the Agreement) entered in Action No. 6071. Appellants filed a counter-petition for determination of entitlement to distribution of the estate (Prob. Code, § 1080), asking 'that the Court determine who are entitled to distribution of said estate;' and seeking a decree 'that said property be distributed in accordance with the terms of [the] judgment rendered in Amador County Superior Court Action No. 6071.'

"The respective petitions were heard together on July 14, 1966. Appellants challenged the probate court's jurisdiction to determine the validity of the Agreement, and attacked the validity of the Agreement itself. On December 12, 1966 (and by a supplemental order filed January 6, 1966), the court filed its decision rejecting the jurisdictional argument, finding that it had jurisdiction to hear and determine all issues presented in the opposing petitions; that the heirs had intended the 1962 Agreement to govern the division and distribution of all the real and personal properties irrespective of the judgment in Action No. 6071 and irrespective of what assets were included or

excluded from the estate by that judgment;[3] that the Agreement was supported by adequate consideration; that respondents had performed their part of the Agreement but appellants had not; that the Agreement had not been abandoned by the parties; and that the Agreement was binding on the parties as heirs or otherwise.'" Footnote 3 provides, "At the July 1966 hearing which preceded this decision, testimony was received as to discussions among counsel representing the parties in Action No. 6071 which indicated their belief that a judgment would have to be entered in that action because of certain tax consequences, and in order to avoid trying the entire matter again in the tax court." Footnote 4 provides, "Because of the significance of the court's findings as to the Agreement in relation to our later discussion, we set out the key portion of the findings in some detail. The court found that the Agreement was 'executed with the intent, on the part of all of the parties thereto, to accomplish thereby the division and method of distribution of the assets of this estate and the associated properties thereto, the assets of this estate being whatever the Court might determine, in said Action No. 6071, were the assets of said estate (This was subsequently determined to be an undivided one-fourth in said real and personal property.), and the associated properties, being the remaining undivided interest in said real and personal property, if any, (This was subsequently adjudicated to be an undivided three-fourths interest therein.); and, with the further intent upon the part of said heirs that such Agreement and Supplement were to constitute a written consent by

all of the heirs to the distribution of the assets of said estate as in such Agreement and Supplement provided, and a partition by agreement of all of the properties involved irrespective of whether said properties were found to be assets of said estate or not in said Action No. 6071 and in any judgment that might be subsequently entered therein. It was the intent of all of the heirs that such Agreement and Supplement were to fully and finally determine the manner of distribution and partition of the entire property covered thereby, whether as an asset of the estate or otherwise.' (Parenthesis in original.)"

"By its order last mentioned, the court directed that the assets of the estate (i.e., the undivided one-fourth interest in decedent's property), be distributed in accordance with the Agreement and directed the administratrix to prepare and file her final report and petition for distribution of the estate accordingly. The court further ordered that appellants execute in favor of respondents the necessary conveyances of respondents' agreed interests in the properties excluded from the estate (i.e., the undivided three-fourths interest) to respondents, and reserved jurisdiction, 'in accordance with the rules and practices of Equity,' to require such conveyances as were necessary to complete enforcement of its order.

"Appellants thereafter appealed from the court's determination."

In the present proceeding, the appellants Joseph, Leo and Leona Garibaldi once again attack the judgment of the probate court in Action No. 3677 of

Amador County and the opinion of this court (3 Civ. 11731) filed October 28, 1968, holding that an agreement signed by each appellant and respondents during the trial of Action No. 6071 in the Superior Court of Amador County had not been abandoned and was intended to govern distribution of the estate. The complaint filed by appellants, reduced by demurrer to two counts which alleged fraudulent conduct by respondents prior to execution of the agreement, sought the imposition of a constructive trust on any properties received by the respondents as a consequence of the probate court's decree based upon the agreement. The trial court failed to find fraud or misrepresentation and denied the relief requested.

Appellants named as defendants, Edith Canvin, individually and as administratrix of the estate of Theresa Garibaldi, Henry J. Garibaldi, Clarence Garibaldi, Raymond Garibaldi, and Elvira Levaggi (all children and heirs of Theresa), and their attorneys J. Calvert Snyder, Harry Mazzera, deceased, and James DeMartini, individually and as partners in the firm of Mazzera, Snyder and DeMartini.

Appellants now contend that (1) the probate court in proceeding 3677, Amador County, did not acquire jurisdiction to determine the validity of the memorandum of agreement; and (2) that the trial court's findings that respondents did not commit acts of fraud in securing appellants' signatures to the memorandum of agreement, and that appellants were given a full and fair hearing in probate proceeding 3677, are not supported by substantial evidence.

I

The first contention has been previously disposed of by this court in 3 Civil 12727 and is therefore res judicata. In that proceeding, appellants challenged the probate court's jurisdiction to determine the validity of the agreement. In the unpublished opinion filed August 11, 1972 (3 Civ. 12727), the following determination was made:

"On appeal, this court in an unpublished opinion filed October 28, 1968,[5] held that the probate court had jurisdiction to make the order under attack." Footnote 5 provides, "Estate of Theresa Garibaldi, also known as Teresa Garibaldi, and Mrs. Peter Garibaldi, Deceased—Joseph J. Garibaldi, et al., v. Henry Garibaldi, et al., 3 Civil 11731, hereinafter referred to simply as 'Garibaldi.' (Hg. den. December 24, 1968.)" "We pointed out that the general rule denying the probate court jurisdiction to pass upon contentions of parties claiming adversely to an estate in probate is subject to well-recognized exceptions, and that '[w]hen a superior court sittting in probate has jurisdiction over one aspect of a claim to property, it may determine all aspects of the claim; it may determine whether a transfer of the interest of an heir, legatee or devisee to a third party is valid and order distribution accordingly. (Estate of Baglione, 65 Cal.2d 192, 196-197.) Where such an agreement embraces property both within and outside the estate, the probate court has jurisdiction to decide the validity of the entire agreement; once its jurisdiction attaches, it extends to the determination of all

questions of law and fact, the decision of which is ancillary to a proper judgment in the case. (Estate of Stanley, 34 Cal.2d 311, 318-320.) (Fn. omitted.)' (*Ibid.*, Unpublished Opinion, p. 5.)

"We further emphasized that the Agreement 'encompassed numerous items of real and personal property, undivided interests in all these items being simultaneously within and outside the estate. The proposed transfers and exchanges created an indissoluble arrangement, ill suited to dispersal between two tribunals. As an arrangement among the heirs affecting distribution of the estate, its interpretation and enforcement were within the jurisdiction of the probate court. Once its jurisdiction attached, the probate court had power to determine the entire matter, even to the extent of ordering the parties to convey assets outside the estate.' (*Id.*, p. 6.)"

The contention reasserted on this appeal is without merit for the reasons previously stated by this court. (3 Civ. 12727; 3 Civ. 11731.)

In addition to the jurisdictional challenge, appellants assert a lack of notice at the time of the motion and hearing in probate court (action 3677), citing as authority Probate Code section 1020.1.[1]

[1]Probate Code section 1020.1 provides in pertinent part:
"The court before making distribution of any property of a decedent to any assignee . . . of any heir, . . . or before making distribution to any person other than an heir, devisee, . . . pursuant to any agreement, request or instructions of any heir, devisee or legatee . . . may on the motion of any person interested . . . or on its own motion inquire into the consideration for such assignment, transfer, agreement, request or instructions . . . and into the circumstances surrounding the execution of such . . . agreement, . . . Notice of a hearing on any motion made pursuant to this section shall be served personally or by registered mail as the court may direct at least 10 days before the hearing . . . ."

The original petition for instructions filed on behalf of the estate relied upon Probate Code section 588, which authorizes the court to instruct the executrix or administratrix as to disposition of an estate. At the hearing on June 9, 1966, Attorney Snyder sought and was granted leave to amend the motion to include a petition for instructions under Probate Code section 1020.1 in order to eliminate any question of the court's jurisdiction to determine the effect of the memorandum agreement. As amended, the motion was granted. At the June 9th hearing, plaintiffs were represented by counsel. The hearing was continued to July 14, 1966, at which time plaintiffs were represented by three attorneys, each of whom made arguments that the court lacked subject matter jurisdiction to determine the effect of the agreement under either Probate Code section 588 or section 1020.1. They did not attack the court's jurisdiction for lack of adequate notice. By their appearance, their participation in the hearing on the motion and failure to object for lack of notice, appellants waived their objections. "Just as noncompliance with the jurisdictional requirement of service of process may be cured by a general appearance of the *party* in the *action* . . . the less serious defect of failure to serve proper notice of motion may be cured by the appearance of *counsel* and his participation in the *hearing* without objection. (*Estate of Pailhe* (1952) 114 C.A.

2d 658, 661 . . . .)" (Emphasis in original.) (4 Witkin, Cal. Procedure (2d ed. 1971) Proceedings Without Trial, § 7, p. 2683; see also Farrar v. McCormick (1972) 25 Cal.App.3d 701, 705.)

The purpose of the notice requirement is to assure that those affected have knowledge of the motion and opportunity to appear. That purpose was here satisfied by the appearance of counsel for appellants at the hearing. The contention asserted is without factual or legal support and must be rejected.

II

Appellants assert insufficiency of the evidence to (a) support the trial court's finding that the respondents did not commit acts of fraud or misrepresent facts to appellants; and (b) that appellants had a full and fair hearing in the probate proceedings. (Action 3677, Amador County.) In resolving this issue, we are bound by the established rule that all factual matters will be viewed most favorably to the prevailing party and in support of the judgment. (Nestle v. City of Santa Monica (1972) 6 Cal.3d 920, 925.)

Appellate courts ordinarily look only at the evidence supporting the successful party and disregard the contrary showing. (6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 249, p. 4241.) All conflicts therefore must be resolved in favor of the findings and judgment. (Nestle v. City of Santa Monica, supra, 6 Cal.3d at pp. 925-926; Crawford v. Southern Pacific Co. (1935) 3 Cal.2d 427, 429.)

The appellants argue that Attorney J. Calvert Snyder acted fraudulently in proceeding 3677, Amador County. At the hearing on the motion for instructions, Snyder represented to the court that the controversial agreement executed during trial of action 6071 (the quiet title proceeding in Amador County) was, in fact, intended as a consent to distribution in the estate, rather than an agreement intended to settle the quiet title action. Appellants point out that previously, Snyder, in a letter to a different court (Judge Airola in action 6071), categorized the document as an attempted settlement agreement which failed, and entreated the court to proceed with the trial to a conclusion. The letter addressed to Judge Airola, dated December 30, 1963, stated in part, "We had been hopeful that all of these formalities would have been settled some time ago, but we have gotten no cooperation in this litigation from the Defendants, Joseph J. Garibaldi, Leo S. Garibaldi, and Leona D. Garibaldi. Their attorneys, I am sure, have been doing everything in their power to complete the settlement, but to no avail. We have finally concluded, even though contracts purporting to settle the litigation have been entered into, that this matter will never be concluded by settlement, and that we must, therefore, press for an early conclusion of the litigation." The court thereafter proceeded with the trial, culminating with the rendition of judgment. Following judgment, Snyder commenced contempt proceedings against the appellants in order to enforce the judgment. No appeal was taken from the decision in proceeding 6071.

After judgment, Snyder settled a federal estate tax dispute in the tax court on the basis of the judgment rather than on the division of property proposed by the agreement. In this latter connection, Snyder caused to be prepared and filed during trial of action 6071 an inventory with the probate court which stated in part:

"I. REAL PROPERTY:

"Interest in the following described parcels of real property, the nature and extent of which will be determined either in litigation or by settlement thereof: (SEE: Action No. 6071 pending in the Superior Court of the State of California, County of Amador, entitled: EDITH CANVIN, as Administratrix of the Estate of Theresa Garibaldi, Deceased, Plaintiff [versus] JOSEPH J. GARIBALDI, LEO E. GARIBALDI and LEONA D. GARIBALDI, Defendants.)"

Appellants argue that in spite of Snyder's representations to Judge Airola that the agreement was a settlement agreement, and his compromise of the tax dispute based upon the judgment in 6071 rather than the attempted settlement, he later referred to the agreement in an appearance before Judge Huberty on the motion for instructions, not as a settlement attempt, but rather as a consent to distribution. At the hearing on the motion for instruction, Snyder stated to the court: "No, your Honor, my opinion is this: The evidence is before the Court on the issues and it seems to be quite clear. Is this not a consent to distribution of the estate; the estate's position is

that it is, that it is a consent to distribution. The estate was not a party to the action and it was made by the heirs and it was made in accordance to our affidavit and with the knowledge and understanding that the other matter would proceed to judgment. . . . I think Mr. Lewis is overlooking the fact that the agreement couldn't settle the law suit. The law suit is between the estate and the heirs. The estate is not a party to this agreement as it was never submitted to the Court for approval and I know it was made with the intention that the property would be distributed in accordance to the agreement.

"MR. LEWIS: The intentions are in the body of that agreement, your Honor, and Mrs. Canvin signed that agreement as the Administratrix of the Estate of Garibaldi.

"MR. SNYDER: Just a minute, Counsel.

"MR. POTTS: As an individual and in a representative capacity."

Appellants argue that Snyder's statements to the probate court that, "The estate was not a party to the action" and that "The estate is not a party to this agreement" were fraudulent misrepresentations inasmuch as proceeding 6071, Amador County, was in fact instituted by Edith Canvin as the administratrix of the estate of Theresa Garibaldi; and during the attempted settlement of 6071, Snyder caused a paragraph to be added to the settlement agreement making the administratrix a party to the agreement in her representative as well as individual capacities as an heir.

Without recitation of other excerpts from the record of inconsistent statements made by Snyder to various courts on the intent and meaning of the agreement, suffice it to say that his acts and conduct are more than puzzling.

Our review of the record, however, fails to reveal fraud or misrepresentations perpetrated or made by the heirs of Theresa, or by the administratrix in her representative capacity. Under such circumstances, imposition of a constructive trust on the estate property distributed by a valid decree of distribution is not appropriate.

On two prior occasions, this court has concluded that notwithstanding Snyder's inconsistent actions, verbal and otherwise, relating to the agreement, it was in fact intended by the parties to be a consent to distribution. In the absence of evidence of actionable fraud on the part of the Garibaldi heirs, the distribution of the property was not only proper but was made pursuant to a valid and final judgment. (Ferguson v. Ferguson (1943) 58 Cal.App.2d 811, 813; Stevens v. Torregano (1961) 192 Cal.App.2d 105, 115.)

Actionable fraud by the heirs of Theresa has not been disclosed by the evidence presented. The actions of Snyder may or may not constitute fraud upon which an order for compensatory damages could rest. The complaint fails to seek money damages for such acts of fraud. We do not here impute malice or fraud to the attorneys, since the record is without evidence

that the character of Snyder's conduct was argued to the trial court in that context.

It is hoped and intended by this opinion that a final armistice will be declared as it relates to the battle over the property of Theresa. We conclude that with the exception of the fraud asserted here, each issue raised has been laid to rest by the prior proceedings (3 Civ. 11731 and 3 Civ. 12727) and are here determined to be res judicata. We additionally find a total absence of fraud on the part of the heirs upon which a constructive trust could be predicated, and that the record of the proceedings held on the motion for instructions relating to the distribution of the estate resulted in a full and fair hearing to each of the parties, at which time their respective contentions were fully presented and ultimately determined.

The judgment is affirmed.

Evans, J.

We concur:

Friedman, Acting P.J.

Regan, J.

Appendix "B"

3 Civil No. 15,956

In the Court of Appeal of the State of California

THIRD APPELLATE DISTRICT

Appeal from the Superior Court of Amador County

JOSEPH J. GARIBALDI, LEO S. GARIBALDI and LEONA D. GARIBALDI,
Plaintiffs and Appellants,
vs.
EDITH CANVIN, as Administratrix of the Estate of Theresa Garibaldi, Deceased, et al.,
Defendants and Respondents.

HENRY J. GARIBALDI, EDITH CANVIN, ELVIRA LEVAGGI, RAYMOND GARIBALDI, and CLARENCE GARIBALDI,
Plaintiffs and Respondents,
vs.
SAMUEL D. ROBINSON, et al.,
Defendants and Respondents.

JOSEPH J. GARIBALDI, LEO S. GARIBALDI, and LEONA D. GARIBALDI,
Interveners.

COMBINED MOTIONS FOR CLARIFICATION AND AUGMENTATION OF RECORD AND PETITION FOR REHEARING

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3 Civil No. 15,956

In the Court of Appeal of the State of California

THIRD APPELLATE DISTRICT

Appeal from the Superior Court of Amador County

JOSEPH J. GARIBALDI, LEO S. GARIBALDI and LEONA D. GARIBALDI,
Plaintiffs and Appellants,
vs.
EDITH CANVIN, as Administratrix of the Estate of Theresa Garibaldi, Deceased, et al.,
Defendants and Respondents.

HENRY J. GARIBALDI, EDITH CANVIN, ELVIRA LEVAGGI, RAYMOND GARIBALDI, and CLARENCE GARIBALDI,
Plaintiffs and Respondents,
vs.
SAMUEL D. ROBINSON, et al.,
Defendants and Respondents.

JOSEPH J. GARIBALDI, LEO S. GARIBALDI, and LEONA D. GARIBALDI,
Interveners.

COMBINED MOTIONS FOR CLARIFICATION AND AUGMENTATION OF RECORD AND PETITION FOR REHEARING

INTRODUCTION

Appellants petition the Honorable Court of Appeal of the State of California, Third Appellate District, for a rehearing. Said petition for rehearing is based on the ground that this Honorable Court, in formulating its opinion of January 5, 1977, whereby the lower court's judgment was affirmed, committed a substantial error of law, perhaps caused by a misunderstanding of certain facts. In particular, this Court, in effect, erroneously held that the Respondents (Henry J. Garibaldi, Edith Canvin, Elvira Levaggi, Raymond Garibaldi and Clarence Garibaldi—hereinafter referred to as Respondent Garibaldis) were entitled to retain property which they had acquired by a probate court judgment *even though* that judgment had been obtained through the fraud of their attorney and agent, Respondent J. Calvert Snyder. Thus, this Honorable Court enunciated the doctrine that a principal is not responsible for the fraudulent acts of an agent which are committed during the course of the agency relationship. Such a holding is in conflict with all established legal decisions. It also precluded Appellants from receiving this Court's determination on the pivotal issue raised by their appeal. This court did not determine whether, as Appellants argued, there was no substantial evidence in the record to support the trial court's finding that Respondent J. Calvert Snyder, as the attorney for the remaining Respondents, did not perpetrate a fraud upon the probate court when he testified that the Estate of Theresa Garibaldi was not a party to the October 22, 1962 Memorandum of Agreement.

I

APPELLANTS REQUEST CLARIFICATION OF THIS COURT'S OPINION

At the outset, Appellants request that this Court clarify that portion of its opinion which states on page 18:

> "We do not here impute malice or fraud to the attorneys, *since the record is without evidence that the character of Snyder's conduct was argued to the trial court in that context.*" (Emphasis Added)

If, by this language, the Court was setting forth the fact that Appellants did not ask the trial court to give them a money judgment as damages for Respondent Snyder's fraudulent conduct, then this Court is correct. On the other hand, if this Court meant to say that Appellants did not assert in the trial court that the imposition of a constructive trust was proper because Respondent Snyder's fraudulent conduct was imputed to his clients, the Administratrix and Respondent Garibaldis, this Court is laboring under a factual misunderstanding which severely prejudices Appellants.

The gist of Appellants' action for the imposition of a constructive trust on the property received by the Respondent Garibaldis was premised solely on the attorney-client, the principal-agent relationship which existed between Respondent J. Calvert Snyder and Respondent Garibaldis. The thrust of Appellants' lawsuit against Respondent Garibaldis was that Respondent J. Calvert Snyder was acting in place of the Administratrix and Respondent Garibaldis when he

fraudulently misrepresented the nature of the October 22, 1962 Memorandum of Agreement to Judge Huberty. Proof of actual personal involvement on the part of the Administratrix and Respondent Garibaldis was not possible for none of these Respondents ever uttered a word before Judge Huberty. Every argument, every statement, every piece of testimony presented in opposition to Appellants' contention that the Estate of Theresa Garibaldi was a party to the October 22, 1962 Memorandum of Agreement came from either the mouth or pen of Respondent J. Calvert Snyder. Under such circumstances, it was sufficient to establish the Respondent J. Calvert Snyder was the attorney and agent of Respondent Garibaldis and that he perpetrated a fraud upon the probate court.

However, in this regard, it must be pointed out that this Court's statement that:

> "Our review of the record, however, fails to reveal fraud or misrepresentations perpetrated or made . . . by the administratrix in her representative capacity."

is *factually incorrect.* It was Edith Canvin, *as Administratrix of the Estate of Theresa Garibaldi,* who petitioned the probate court for its order directing the estate to be distributed in accordance with the supposed "Settlement and Consent to Distribution Agreement." Clerk's Transcript on Appeal, Vol. III, p. 840. It was also Respondent J. Calvert Snyder, in his capacity as attorney for the Administratrix (Clerk's Transcript on Appeal, Vol. III, p. 854, l. 24 through p. 855, l. 2; p. 858, ls. 21-22), and, thus acting in her place, who testified on the stand and by affidavit that the estate was not a party to the October 22, 1962 Memorandum of Agreement and that the Agreement was "an expression of the intent and consent to distribution and partition of the properties involved as between the parties involved, irrespective of whether said properties were found to be assets of said estate or not." Clerk's Transcript on Appeal, Vol. III, p. 855, l. 26 through p. 856, l. 4.

The fact that Appellants' cause of action was founded upon the relationship which existed between Respondent J. Calvert Snyder and Respondents is more than amply supported by the record—for instance, Appellants' Complaint (Clerk's Transcript on Appeal, Vol. I, p. 173, l. 25 through p. 174, l. 11), and the examination of Respondent J. Calvert Snyder at trial alone. However, conclusive evidence of this fact can be discerned from a reading of the Opening Argument which Appellants filed with the trial court. There, at Page 3, lines 21-25, Appellants argued:

> "If an advocate practices a deceit upon his adversary by means of a misrepresentation neither the fraudulent party *nor his clients, who would benefit from such deceit, should be allowed to retain the benefits derived.*" (Emphasis added)

and at page 3, line 32 through page 4, line 6, Appellants pointed out:

> "While an attorney is under a duty to protect his client's interests, he is under an equally imperative obligation to aid the court in avoiding

error and in determining the cause in accordance with justice and established rules of practice. *Where an attorney leads the court into error, his client is not entitled to favors within the court's discretion.*" (Emphasis added)

Further support can be found in the Objections to Proposed Conclusions of Law and Proposed Corrections which Appellants filed on September 19, 1975, in the trial court. Accordingly, if the above cited language of this Court is intended to mean that Appellants did not argue in the trial court that Respondent Snyder's acts were imputed to the Administratrix and Respondent Garibaldis, Appellants would ask this Court to augment the record on appeal with these pleadings so as to make the record conform to the truth. See, Witkin, *California Procedure,* 2nd Ed., Vol. 6, Appeal, §412, pp. 4380-4381 and cases cited therein.

II

THIS APPELLATE COURT OVERLOOKED THE FACT THAT RESPONDENT SNYDER'S FRAUD IS IMPUTED TO RESPONDENT GARIBALDIS

In reading this Court's Opinion, it appears as if the Court concluded that a constructive trust could not be imposed on the property which Respondent Garibaldis received under the probate court judgment because there was no evidence in the record that these five Respondents *personally* perpetrated any fraud upon, or made any misrepresentation to, Judge Huberty. In this regard, this Honorable Court said:

"Our review of the record, however, fails to reveal fraud or misrepresentations perpetrated or made by the heirs of Theresa, or by the Administratrix in her representative capacity. Under such circumstances, imposition of a constructive trust on the estate property distributed by a valid decree of distribution is not appropriate."

In almost the same breath, however, this Court recognized the inherent improbability of Respondent Snyder's testimony and the fact that he may have been guilty of fraud where it stated:

"Without recitation of other excerpts from the record of inconsistent statements made by Snyder to various courts on the intent and meaning of the agreement, suffice it to say that his acts and conduct are more than puzzling . . .

". . . The actions of Snyder *may or may not constitute fraud* upon which an order for compensatory damages could rest." (Emphasis added)

A comparison of these two extracts from the Court's opinion clearly brings to light the legal inconsistencies and error contained in the decision. On the one hand, the Court suggests that the attorney for the Respondent Garibaldis, Respondent J. Calvert Snyder, may have been guilty of fraud and malice in the course of his representation of his clients; and yet, on the other hand, the Court disregards the fraudulent conduct of Respondent Garibaldis' attorney in concluding that a constructive trust may not be imposed on the property which Respondent Garibaldis obtained by reason of this same fraudulent conduct. The Court's

decision constitutes a legal anomaly which cannot withstand careful scrutiny.

In order to be entitled to the trial court's judgment imposing a constructive trust on the property which Respondent Garibaldis acquired through the fraudulent acts of their attorney and agent, Appellants were not required to prove that Respondent Garibaldis, themselves, personally perpetrated a fraud on the probate court. Appellants would be entitled to such a judgment if they established that Respondent Garibaldis' attorney and agent committed such a fraud. It is this principle which this Honorable Court overlooked in reaching its decision. It is set forth in Section 263 of the *Restatement of the Law,* 2d, Agency, as follows:

> "Unless he has changed his position, *a principal whose servant or other agent has fraudulently acquired property for him, holds it subject to the interests of the defrauded person.* If the principal is liable in tort for the fraud of the agent, his change of position after acquiring the property is not a defense." (Emphasis added)

Here, as a matter of law, Respondent J. Calvert Snyder was the agent of the Administratrix of Theresa Garibaldi's estate on account of his position as attorney for the estate. (See, 7 Cal.Jur.3d, Attorneys at Law, Section 216 et seq., page 525 et seq.; Restatement of the Law, 2d, Agency, Section 1(e) page 11.) In addition, he was the agent of Respondent Garibaldis inasmuch as he had been retained by them and been guaranteed payment of $50,000 for his at-

tempt to recover the property which Theresa Garibaldi had transferred to Appellants by deed. (See, Appellants' Opening Brief, p. 3, ls. 18-27; p. 8, l. 27 through p. 9, l. 2). Because of the existence of this agency relationship and the applicability of the general rules of agency (See, 7 Cal.Jur.3d, Attorneys at law, § 216, pp. 525-526), the fraudulent conduct of Respondent J. Calvert Snyder is imputed to the Administratrix and to Respondent Garibaldis. Thus when Respondent J. Calvert Snyder falsely stated that the estate was not a party to the October 22, 1962 Memorandum of Agreement and that the agreement was not intended to end Action 6071, those misrepresentations became the misrepresentations of his clients—the Administratrix and Respondent Garibaldis—as a matter of law.

In view of these circumstances, the requisite evidence of fraud upon which a constructive trust should be predicated does exist. Principals, such as Respondent Garibaldis, cannot insulate themselves from liability or shield themselves from the ability of a defrauded party to obtain the imposition of a constructive trust merely by having their agent do their dirty work. If this Court's present position is accepted, a principal could, with impunity, have his attorney lie, steal and cheat for him and retain the benefits derived from his agent's wrongful conduct. Such a holding, in itself, amounts to a travesty of justice which cannot be sanctioned or countenanced in any civilized social order.

III

APPELLANTS ALSO SOUGHT TO IMPOSE A CONSTRUCTIVE TRUST ON PROPERTY WHICH RESPONDENT J. CALVERT SNYDER RECEIVED BECAUSE OF HIS OWN FRAUDULENT ACTS.

In brief, the error which this Honorable Court committed is that it closed its eyes to the fact that Respondent Snyder's actions were necessarily imputed to his clients. This Court treated Respondent J. Calvert Snyder and Respondent Garibaldis as completely separate and distinct defendants. If Respondent J. Calvert Snyder was not the attorney and agent of the Administratrix and the Respondent Garibaldis, the opinion would bear some semblance of validity. However, in view of the fact that Respondent J. Calvert Snyder's conduct becomes that of his clients, the Court's determination that the imposition of a constructive trust was improper is *simply wrong.*

Even if this principle were not applicable, this Court's opinion would be in error for another reason. In addition to asking the trial court to impose a constructive trust on the property which Respondent Garibaldis received as a result of Respondent Snyder's fraud, Appellants requested the trial court to impose a constructive trust on that property which Respondent Snyder and his law firm held as the assignee of Clarence Garibaldi (See Clerk's Transcript on Appeal, Vol. I, p. 159, ls. 10-23; p. 172, ls. 5-7; p. 178, ls. 13-26) and which they similarly acquired as a result of Respondent Snyder's misrepresentations. In view of Respondent Snyder's direct

participation in, and gain from, his own fraudulent conduct, Appellants submit that resolution of the issue of whether any evidence exists to support the trial court's finding that Respondent Snyder was not guilty of fraud is imperative.

IV

CONCLUSION

In conclusion, Appellants ask this Honorable Court to recognize the legal impropriety of its decision. The question of whether Respondent J. Calvert Snyder's representations to Judge Huberty were fraudulent was never presented to this Court, except by this present appeal. In proceedings 3 Civ. 11731 and 3 Civ. 12727, this Appellate Court was not asked to decide that question, but was instead asked to determine whether the probate court's holding that the Estate of Theresa Garibaldi was not a party to the October 22, 1962 Memorandum of Agreement was supported by substantial evidence in the record. This Court held that such evidence did exist. *That evidence was Respondent J. Calvert Snyder's misrepresentations to the probate court.* Thus, in this present proceeding for the imposition of a constructive trust because of Snyder's fraud, the finding that the October 22, 1962 Memorandum of Agreement "was in fact intended by the parties to be a consent to distribution" (Court's Opinion, page 17), is not res judicata. As was stated in *Campbell-Kawannanakoa v. Campbell,* 152 Cal. 201, 92 P. 184, 187:

> "This character of relief is very common in the matter of fraudulent probate proceedings. The order or decree from the effect of which relief is sought cannot constitute a bar to such equitable action. As has been said, it is solely because of the order or decree, collaterally unassailable and valid on its face, that the equitable jurisdiction is necessary and exists."

Because the conduct of Respondent J. Calvert Snyder is imputed to his clients—the Administratrix and Respondent Garibaldis, this Court's suggestion that a constructive trust could be imposed on the property which Respondent Garibaldis received *only if* Respondent Garibaldis *personally* perpetrated a fraud amounts to legal error. A duty is imposed upon this Court to decide whether, as Appellants have argued throughout their briefs, Respondent J. Calvert Snyder's conduct can only be characterized as fraudulent. Appellants believe that this Court, after examining his acts and conduct, can only conclude that those acts and conduct were not just "puzzling", but that his representations to Judge Huberty were fraudulent. In such circumstances, a constructive trust should be imposed not only on the property which Respondent J. Calvert Snyder obtained by reason of his fraud, but also on that property which his clients also received *and for which they guaranteed Respondent J. Calvert Snyder the sum of $50,000. Campbell-Kawannanakoa v. Campbell,* supra; *Estate of Cecala,* 104 Cal.App.2d 526, 232 P.2d 48; *Ferguson v. Ferguson,* 58 Cal.App.2d 811, 137 P.2d 735; *Purinton v.*

Dyson, 8 Cal. 2d 322, 327; 65 P.2d 777, 113 A.L.R. 1230; *Estate of Ross,* 180 Cal. 651, 182 P. 752; *Security-First Nat. Bk. of Los Angeles v. Superior Court,* 1 Cal.2d 749, 37 P.2d 69; *Sohler v. Sohler,* 135 Cal. 323, 67 P. 282; *Thayer v. Fish,* 49 Cal.App.2d 618, 122 P.2d 358; *Simonton v. Los Angeles Trust & Sav. Bank,* 192 Cal. 651, 221 P. 368; *Wingerter v. Wingerter,* 71 Cal. 105, 11 P. 853. To do otherwise would be to convert this legal system, as to Appellants, into an instrument of injustice and oppression.

Dated this 13th day of January, 1977.

VARGAS, BARTLETT & DIXON
By /s/ JAMES S. BEASLEY
Attorneys for Appellants
201 West Liberty Street
Reno, Nevada 89501

AFFIDAVIT OF SERVICE BY MAIL

(Must be attached to original or a true copy of paper served)

No. 3 Civil 15956

State of Nevada,
County of Washoe—ss.

Ruth A. Ratkoviak, being sworn, says that he is a citizen of the United States, over 21 years of age, a resident of Washoe County, and not a party to the within action.

This affiant's residence (business) address is 201 West Liberty Street, Reno, Nev.

That affiant served a copy of the attached Combined Motions for Clarification and Augmentation of Record and Petition for Rehearing by placing said copy in an envelope addressed to Mazzera, Snyder & De Martini, at his office (residence) address 115 North Sutter Street, Stockton, California; Howard S. Dattan, Esq., 2067 First Avenue, San Diego, California which envelope was then sealed and postage fully prepaid thereon, and thereafter was on January 17, 1977, deposited in the United States mail at Reno. That there is delivery service by United States mail at the place so addressed, or regular communication by United States mail between the place of mailing and the place so addressed.

/s/ Ruth A. Ratkoviak

Subscribed and sworn to before me on January 17, 1977.

/s/Elaine Murray

Notary Public in and for said County and State.

My Commission Expires September 9, 1980.

(Seal)

Elaine Murray

Appendix "C"

In the Court of Appeal
State of California
Third Appellate District

3 Civil 15956
Amador 7767 & 8468

Joseph J. Garibaldi
vs.
Edith Canvin

[Filed Jan. 25, 1977]

BY THE COURT:

Appellants' motions for clarification and augmentation of record and petition for rehearing are denied. Dated: January 25, 1977.

Friedman, Acting P. J.

cc: Vargas, Bartlett & Dixon
Attorneys at Law
201 W. Liberty St.
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cc: Howard S. Datton
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San Diego, CA. 92101

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Appendix "D"

Order Due
March 4, 1977

ORDER DENYING HEARING

After Judgment by the Court of Appeal
3rd District, Division—, Civil No. 15,956

In the Supreme Court of the State of California

In Bank

Garibaldi et al.,
Plaintiffs and Appellants
v.
Canvin, As Administratrix, etc., et al,
Defendants and Respondents;

Garibaldi et al.,
Plaintiffs and Respondents
v.
Robinson et al.,
Defendants;
Garibaldi et al.,
Intervenors and Appellants.

[Filed Mar. 3, 1977]

Appellants' petition for hearing DENIED.

Tobriner
Acting Chief Justice

76-1350

Supreme Court, U. S.
FILED
APR 22 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

JOSEPH J. GARIBALDI, LEO S. GARIBALDI and LEONA D. GARIBALDI,

Petitioners,

vs.

EDITH CANVIN, as Administratrix of the Estate of Theresa Garibaldi, Deceased, et al.,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI
to the Court of Appeal of the State of California
Third Appellate District

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76 S.Ct. 167, 350 U.S. 85, 100 L.Ed. 77 6

Truman v. Haberkern, (1929)
208 Cal. 256, 280 Pac. 970 8

United States v. Throckmorton, ( )
98 U.S. 61, 65, 25 L.Ed. 93 13

MISCELLANEOUS

California Constitution,
Article III, Section 2 5
Article VI, Section 11 7

California Rules of Court, Appellate Rules . 8

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

JOSEPH J. GARIBALDI, LEO S.
GARIBALDI and LEONA D. GARIBALDI,

Petitioners,

vs.

EDITH CANVIN, as Administratrix
of the Estate of Theresa Garibaldi,
Deceased, et al.,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI
to the Court of Appeal of the State of California
Third Appellate District

INTRODUCTION

The following response to the Petition for Writ of Certiorari is submitted on behalf of Clarence and Raymond Garibaldi, two of the defendants in the trial and respondents in the appellate court. A portion of the response will refer to matters that this court presumably will not verify unless the writ is granted. Such references are made where the petition for the writ is in factual error.

STATEMENT OF THE CASE

Petitioners' statement of the case is in error in the first paragraph thereof (page 5). The statement is there made that:

> "By reason of Snyder's fraudulent representations Petitioners contended, the probate court erroneously believed that the agreement related in part to property which was properly included in the estate when, in fact, the estate, as a party to the agreement, waived any claim which it might have to said property."

In fact the estate (of Theresa Garibaldi, deceasd 1956) was *not* a party to the referred to agreement (of 1962) and because it was not a party to the agreement made between the heirs (eight Garibaldi children, three of whom are the present petitioners and the other five and the estate the respondents) the agreement did in fact relate to property in which the estate had an interest since probate had not been concluded. In any event the question of whether the probate court properly exercised its jurisdiction is a question of state law and the appellate courts of California have twice held in previous appeals that there was jurisdiction.

The estate attorney was J. Calvert Snyder and it was his testimony that was attacked in the present action as constituting extrinsic fraud in the probate court in 1966. (Proceeding #3677, Amador County.)

At the conclusion of the trial of the present action the trial court made extensive findings of fact (Appendix "A" hereto) in which findings the court concluded that there was no evidence of extrinsic fraud in Probate Proceeeding #3677. (Appendix „A" hereto, Findings of Fact #4, #5 p. 3; #8, #9 p. 4; #13, #15 p. 5; #17 p. 6; #28 p. 9.)

Petitioners' Statement of the Case is again in error in intimating in the second paragraph thereof (page 6) that attorney Snyder was the attorney for Clarence and Raymond Garibaldi at the time and in the action in which the asserted extrinsic fraud took place.

On page 6 of the petition to this court the following appears:

> "The court recognized the fact that J. Calvert Snyder was the attorney for the administratrix and the five Garibaldi respondents."

Reference is then made in the petition to Petitioners' Appendix "A", page viii, lines 19-20.

As will be shown later in this response there is no provision in the California law for an appellate court to "recognize" a finding of fact that was not made in the trial court, and while an appellate court has certain limited fact finding powers they were not exercised here.

In truth as petitioners are well aware neither Mr. Snyder nor any member of his law firm represented either Clarence or Raymond Garibaldi. The two were represented by the present writer, Howard S. Dattan. If the appellate court's statement is to be read that either Snyder or any member of the law firm to which he belonged represented either Clarence or Raymond it is in error, probably occasioned by the voluminous transcript encompassing matters in litigation over the past fifteen years, including several appeals and unsuccessful petitions to the California Supreme Court.

It follows that petitioners' statement on page 7 of their petition that the respondent Garibaldis may have obtained property *through the wrongful conduct of their attorney* is also not true as to respondents Clarence and Raymond Garibaldi.

Even if such wrongful conduct of Mr. Snyder had been shown, which it *was not*, he was not the attorney for Clarence and Raymond.

THE WRIT SHOULD NOT BE ALLOWED

The Supreme Court has stated that the importance of the case rather than the possibility of error is the determining factor in granting or denying certiorari. (Rule 19, Rules of the United States Supreme Court.)

Certainly the present case is important to the eight Garibaldi heirs. The petitioners herein have waged a losing battle for years concerning the construction of a 1962 agreement purporting to settle the dispute between the parties which goes back to the death of their mother in 1956. This battle has been fought up and down the length and breadth of the California judicial system and on its frontiers as well.

Nevertheless the desire to triumph emotionally, financially, or legally or all three, does not make the case unique or of signal importance except to those intimately involved. No novel or significant questions of law are involved nor are the matters presented likely to recur.

A. NO FEDERAL QUESTION IS PRESENTED.

The present petition is based upon an argument that a federal question or questions arose not in the trial court but in the appellate court by the alleged failure of that court to consider and abide by established California law concerning the imputation of the fraud of an agent to his principal.

It already has been remarked that attorney Snyder was not the agent of either Clarence or Raymond Garibaldi, and more will be said of this later.

Regardless of the agency relationship, whether the appellate court followed California law is a California question and not a federal question.

The Constitution provides that federal courts may be given jurisdiction over . . . "cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority." (Article III, Section 2)

While the meaning of the phrase "arising under" has not been clearly defined, and may never be, it would appear that this phrase does not include questions arising under the constitutions of the various states.

Certainly no case cited in the petition supports petitioners' argument that since the California Constitution confers a right of appeal an alleged failure of the appellate court to follow state decisional law raises a federal question. Yet this is exactly what petitioners contend.

Petitioners' argument is that since the appellate court did not follow what they believe to be the law of the state they were denied equal protection of the law and deprived of due process. If this argument stands up this court may well anticipate a flood tide of petitions from parties who disagree with appellate decisions.

While it is true that the California Constitution guarantees a right of appeal, there is no guarantee therein that the appellate court will decide in favor of the appealing party.

B. NO FEDERAL QUESTION WAS RAISED IN THE CALIFORNIA COURTS.

It has been held that the timeliness with which the federal question is raised in the state court is critical. Failure to raise the question at the stage of proceedings required by state law will preclude review (*Edelman v. California*, (1953) 3 S.Ct. 293, 344 U.S. 357, 97 L.Ed. 387), unless the state rule permits no fair opportunity to assert the question. (*National Mutual Bldg. Assoc. v. Brahan*, (1904) 24 S.Ct. 532, 193 U.S. 635, 48 L.Ed. 823; *Reece v. Georgia*, (1955) 76 S.Ct. 167, 350 U.S. 85, 100 L.Ed. 77.)

It is not too late to raise a federal question by petition for rehearing to the state appellate court where the decision of that court has unexpectedly given rise to a federal question that the party seeking review has had no previous opportunity to assert and could not fairly have anticipated. (*Missouri ex rel Missouri Ins. Co. v. Gehner*, (1930) 50 S.Ct. 326, 281 U.S. 313, 74 L.Ed. 870; *Brinkerhoff-Faris Trust and Savings Co. v. Hill*, (1930) 50 S.Ct. 451, 281 U.S. 673, 74 L.Ed. 1107.)

Petitioners have included their Petition for Rehearing to the appellate court in their petition as Appendix "B". A reading of that petition reveals that no federal question of any sort was raised. Accordingly this constituted a failure to raise the purported federal questions at the appropriate opportunity in the state court.

C. NEITHER ATTORNEY SNYDER NOR ANY MEMBER OF THE LAW FIRM OF MAZZERA, SNYDER AND DeMARTINI WAS THE AGENT OF CLARENCE OR RAYMOND GARIBALDI.

As pointed out in the correction of the facts recited in the petition, attorney Snyder did not represent either Clarence or Raymond Garibaldi in the probate proceeding wherein he is alleged by petitioners to have commited extrinsic fraud. Neither did any member or his law firm represent either of them. Nor was he or any member of his firm the agent for either Clarence or Raymond in any manner.

While it is true the appellate court referred to the law firm of Mazzera, Snyder and DeMartini and its partners as the attorneys for the "defendants," thereby lumping all defendants together this was a recitative error on the part of the court.

Reference to Appendix "A" hereto (the trial court's findings of fact) will reveal that there was no finding of fact in the trial court that the Mazzera, Snyder and DeMartini law firm or any of its partners represented either Clarence or Raymond Garibaldi in the probate action.

The entire thrust of the petition is that Clarence and Raymond Garibaldi (as well as the other Garibaldi heirs) benefited by the wrongful conduct of their attorney Snyder.

There is not the slightest indication in the appellate court's decision that it intended its reference to constitute a finding of fact contrary or supplemental to those findings made by the trial court.

While the appellate courts of California have fact finding power granted to them by Article VI, Section 11 of the California Constitution which reads in its entirety:

> "The Legislature may permit appellate courts to take evidence and make findings of fact when jury trial is waived or not a matter of right."

such power is limited in its scope (*Tupman v. Haberkern,* (1929) 208 Cal. 256, 280 Pac. 970).

The *Tupman* case has been followed and cited with approval by many subsequent California courts. (*Isenberg v. Sherman,* (1931) 212 Cal. 454, 461, 298 Pac. 1004, 299 Pac. 528; *Davis v. Chipman,* (1930) 210 Cal. 609, 623, 293 Pac. 40; *Burton v. Los Angeles Ry. Corp.,* (1947) 79 Cal.App.2d 605, 611, 180 Pac.2d 367.)

As remarked in the *Tupman* case referring to the Constitutional provision:

> "... the effect of the ... law is to create and establish an exception to the general rule; that the primary and principal purpose of this exception is to enable the reviewing courts to make contrary or additional findings on the record presented or on new evidence taken, to the end that the judgment *be affirmed or modified and affirmed and the litigation be terminated;* (emphasis added) that when the judgment appealed from must be reversed and a new trial is ordered, . . . findings of fact by the reviewing court become inappropriate and unauthorized. . . ." (208 Cal. 256, 270; 280 Pac. 970.)

Further, California Rules of Court, Appellate Rules, specifies the necessary procedure to invoke the appellate

court's fact finding powers. Even if a request for additional findings is made it will be denied where there is no attempt to comply with Rule 23.

In the present case no such request was made, much less any attempt to comply with Rule 23.

D. THE JUDGMENT OF THE APPELLATE COURT RESTED ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

Petitioners assert (Petition pp. 9-10) that they were entitled, pursuant to the due process clause of the Federal Constitution to an appellate review of their claim of error on the part of the trial court and ... entitled to have the appellate court rule on the issue of whether there was any substantial evidence in the record to support the trial court's finding that J. Calvert Snyder did not perpetrate any fraud.

They further assert (petition p. 10) that the appellate court did not so rule, but held it unnecessary to decide the issue because there was no showing that the Respondent Garibaldis personally perpetrated any fraud.

In fact the appellate court commenced its discussion of the asserted insufficiency of the evidence in Part II of its opinion(Petitioners' Appendix "A" p. xii). The court there commented that in resolving this issue it was bound by the established (California) rule that all factual matters will be viewed most favorably to the prevailing party and in support of the judgment. (Citing *Nestle v. City of Santa Monica,* (1972) 5 Cal.3d 920, 925.)

The court then proceeded for the next three and one half pages of its decision to analyze attorney Snyder's testimony at the probate proceeding #3677 in Amador County. (Testimony given in 1966.)

Further the appellate court went back in time and reviewed matters occurring from 1963 until the time that Snyder testified in the probate court in 1966. This extensive review was undertaken for the purpose of reviewing the trial court's determination that Snyder's testimony was not extrinsic fraud. In confirming that determination the appellate court examined not only the testimony but the events of the previous years which led up to it.

The appellate court concluded that Snyder had made inconsistent statements to various courts on the intent and meaning of the agreement and commented that his acts and conduct were more than puzzling. (Petitioners' Appendix "A" p. xvi.)

In addition the court commented that the actions of Snyder may or may not constitute fraud upon which an order for *compensatory* damages might rest, but said that it did not impute malice since the record was without evidence that the character of Snyder's conduct was argued to the trial court in that context. (Petitioners' Appendix "A" pp. xvi-xvii.)

The court also stated:

> "Our review of the record, however, fails to reveal fraud or misrepresentations perpetrated or made by the heirs of Theresa, or by the administratix in her representative capacity." (Petitioners' Appendix "A" p. xvi.)

> "In the absence of evidence of actionable fraud on the part of the Garibaldi heirs, the distribution of the property was not only proper but was made pursuant to a valid judgment." (Petitioners' Appendix "A" p. xvi.)

> "Actionable fraud by the heirs of Theresa has not been disclosed by the evidence presented." (Petitioners' Appendix "A" p. xvi.)

> "We additionally find a total absence of fraud on the part of the heirs upon which a constructive trust could be predicated. . . ." (Petitioners' Appendix "A" p. xvii.)

And finally:

> "On two prior occasions this court has concluded that notwithstanding Snyder's inconsistent actions, verbal and otherwise, relating to the agreement, it was in fact intended by the parties to be a consent to distribution." (Petitioners' Appendix "A" p. xvi.)

Since the court concluded that the agreement was in fact intended to be an agreement of distribution, Snyder's testimony to that effect was truthful, and could not constitute fraud of any sort.

It is submitted therefore that the appellate court fully considered the agreements of petitioners and resolved the case upon the basis of California law, and acted within the ordinary confines of appellate review as set forth in California.

> "In examining the sufficiency of the evidence to support a questioned finding, an appellate court must accept as true all evidence tending to establish the correctness of the finding as made, taking into account,

as well, all inferences which might reasonably have been thought by the trial court to lead to the same conclusion. Every substantial conflict in the testimony is, under the rule which has always prevailed in this court to be resolved in favor of the finding." (*Bancroft-Whitney v. McHugh*, (1913) 166 Cal. 140, 142, 134 Pac. 1157.) See also *Estate of Teel*, (1944) 25 Cal.2d 520, 527, 154 Pac.2d 384.

> "Of course all of the evidence must be examined, but it is not weighed. All of the evidence most favorable to the respondent must be accepted as true, and that unfavorable discarded as not having sufficient verity to be accepted by the trier of fact. If the evidence so viewed is sufficient as a matter of law, the judgment must be affirmed." (*Estate of Teel*, (1944) 25 Cal.2d 520, 527, 154 Pac.2d 384.)

Nowhere in their petition do petitioners appear to recognize that under California law they had the burden of proof and that their evidence in order to prove extrinsic fraud must be clear and convincing.

> "In an action to establish a constructive trust in real property, plaintiff has the burden of proving the allegations of his complaint by clear and convincing proof. (*Dagdagian v. Dagdagian*, (1956) 139 Cal.App.2d 721, 249 Pac.2d 507.) See also *Fowler v. Fowler*, (1964) 227 Cal.App.2d 741.

In asking this court to issue a writ of certiorari not only are petitioners seeking relief beyond the jurisdiction of the court but they ignore the fact that even if Snyder's testimony as to the nature of the agreement was in error it would then simply be an erroneous interpretation or belief. Under California law, even if testimony is perjury it is not extrinsic fraud. *Pico v. Cohen*, (1891) 91 Cal. 29; *Adams v. Martin*, (1935) 3 Cal.2d 246.

> "The fraud which will justify the setting aside of a final judgment by a court of equity must be of such character as prevents a trial of those issues presented to the court for a determination. . . ." (*Gale v. Witt*, (1948) 31 Cal.2d 362, 188 Pac.2d 755.)

The classic statement pertaining to extrinsic fraud is contained in the case of *United States v. Throckmorton*, ( ) 98 U.S. 61, 65, 25 L.Ed. 93:

> "Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by an opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interests to the other side; these, and similar cases which show that there has never been a real

> contest in the trial or hearing of the case, are reasons for which a suit may be sustained, to set aside and annul the former judgment or decree, and open the case for a new and fair hearing . . . In all these cases and many others which have been examined, relief has been granted on the ground that by some fraud practiced directly upon the parties seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court."

The trial court found that plaintiffs (here petitioners) had and were given, a full and fair opportunity to be heard and present their case. (Appendix "A" hereto, Finding of Fact #4, p. 3)

Further the court found that the petitioners received due process of law throughout such proceedings. (Appendix "A" hereto, Finding of Fact #5, p. 3)

CONCLUSION

Accordingly for all of the reasons given herein it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

HOWARD S. DATTAN

Counsel for Respondents
Clarence Garibaldi and
Raymond Garibaldi

APPENDIX

WILLIAM J. MAZZERA
DAVID WM. BAIRD
MAZZERA, SNYDER & DE MARTINI
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Stockton, California 95202
Telephone: 466-4267
Attorneys for all Defendants in
#7767 and all Plaintiffs in #8468,
except Clarence Garibaldi and
Raymond Garibaldi

SUPERIOR COURT OF CALIFORNIA, COUNTY OF AMADOR

-oOo-

JOSEPH J. GARIBALDI, LEO S. GARIBALDI and LEONA D. GARIBALDI, Plaintiffs, vs. EDITH CANVIN, as Administratrix of the Estate of Theresa Garibaldi, Deceased, et al., Defendants.	NO. 7767 (Third & Fourth Causes of Action) CONSOLIDATED FINDINGS OF FACT AND CONCLU-SIONS OF LAW
HENRY J. GARIBALDI, EDITH CANVIN, ELVIRA LEVAGGI, RAYMOND GARIBALDI, CLARENCE GARIBALDI, Plaintiffs, vs. SAMUEL D. ROBINSON, et al., Defendants.	No. 8468 (Complaint in Intervention)
JOSEPH J. GARIBALDI, LEO S. GARIBALDI, and LEONA D. GARIBALDI, Interveners.	

-oOo-

The above-entitled consolidated causes came on regularly for trial of the Third and Fourth Causes of Action of the Second Amended Complaint in Action #7767 and the Complaint in Intervention in Action #8468 before the above-entitled Court, Honorable Judge John B. Neblett presiding, on May 5, 1975, without a jury, VARGAS, BARTLETT & DIXON, by JOHN C. BARTLETT and JAMES S. BEASLEY, appearing as attorneys for plaintiffs in #7767 and Intervenors in #8468, such parties hereinafter referred to as plaintiffs, and MAZZERA, SNYDER & DE MARTINI, A Professional Corporation, by WILLIAM J. MAZZERA and DAVID WM. BAIRD appearing as attorneys for all defendants in #7767, except Raymond Garibaldi and Clarence Garibaldi, and all plaintiffs in #8468, except Raymond Garibaldi and Clarence Garibaldi, such parties hereinafter referred to as defendants, HOWARD S. DATTAN appearing as attorney for Raymond Garibaldi and Clarence Garibaldi, such parties also hereinafter referred to as defendants. Witnesses were sworn and examined, documentary evidence was introduced on behalf of the respective parties, and the evidence being closed, the cause was submitted to the Court for decision. The Court having rendered its decision in favor of defendants and against plaintiffs, Joseph Garibaldi, Leo S. Garibaldi and Leona D. Garibaldi as to the Third and Fourth Causes of Action of the Second Amended Complaint in Action #7767 and against Intervenors, Joseph Garibaldi, Leo S. Garibaldi and Leona D. Garibaldi, on the Complaint in Intervention in Action #6468, now makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The defendants did not conceal, willfully, intentionally or otherwise, from the plaintiffs or the Court in Amador County Probate #3677 the fact that a consent judgment based upon the validity and conclusiveness of the

judgment entered in Amador County Action #6071 had been obtained in the United States Tax Court with regard to taxes due in the Estate of Theresa Garibaldi, Deceased.

2. The defendants did not conceal, willfully, intentionally or otherwise, from plaintiffs or the Court in Amador County Probate #3677 the fact that defendants had commenced Amador County Action #7192 for specific performance of the Memorandum of Agreement dated October 22, 1962.

3. Prior to June 9, 1966, plaintiffs and their attorneys knew or should have known of the filing of Amador County Action #7192 and the existence of the consent judgment in the United States Tax Court matter of the Estate of Theresa Garibaldi, Deceased.

4. Plaintiffs had, and were given, a full and fair opportunity to be heard and present their case in the hearings on defendant Edith Canvin's Petition for Instructions as Executrix in Amador Probate #3677, and likewise, on plaintiffs' Petition for Determination of Entitlement to Distribution of Estate in the same probate proceeding during the months of June and July, 1966.

5. Plaintiffs have received due process of law throughout the proceedings in Amador County Probate #3677.

6. Prior to June 9, 1966, plaintiffs had knowledge of all of the proceedings, orders, judgments, opinions, pleadings, and motions in Amador County Action #6071.

7. Prior to June 9, 1966, plaintiffs had knowledge of all of the proceedings, orders, judgments, opinions, pleadings and motions filed in the United States Tax Court with regard to the Estate of Theresa Garibaldi, Deceased.

8. None of the defendants in Action 7767, consolidated herein, and none of their attorneys committed any act of concealment, misrepresentation, fraud, deceit or breach of trust on plaintiffs or on the Court in Amador County Probate #3677.

9. Since the death of their mother, THERESA GARIBALDI, in 1957, and in all proceedings relating to her said estate before the above-entitled Court in proceeding #3677, plaintiffs were represented by counsel of their own choosing.

10. Parties plaintiffs and parties defendants in Action #7767 and parties plaintiff and parties intervenors in the Complaint in Intervention in Action #8468 are identical to the parties before the above-entitled Court in Probate proceeding #3677, except for defendants MAZZERA, SNYDER & DE MARTINI, a partnership and its individual partners, who are bound by those prior judgments, orders and decrees by reason of being assignees of CLARENCE GARIBALDI, one of the defendants in this matter and a party bound by those prior judgments, orders and decrees.

11. Parties plaintiff and parties defendant in Action #7767 and parties plaintiff and parties intervenors in the Complaint in Intervention in Action #8468 are identical to the parties before the Court in Action #18717, Superior Court, County of El Dorado, except for defendants MAZZERA, SNYDER & DE MARTINI, a partnership and its individual partners, who are bound by that prior judgment by reason of being assignees of CLARENCE GARIBALDI, one of the defendants in this matter and a party bound by that prior judgment.

12. Plaintiffs were personally present and/or represented in all proceedings regularly docketed, calendared, duly noticed and held in open Court before the above-entitled Court in *Canvin, et al., vs. Garibaldi, et al.,* Action #6071.

13. Plaintiffs were personally present and/or represented in all proceedings regularly docketed, calendared, duly noticed and held in open Court before the above-entitled Court in the *Estate of Theresa Garibaldi,* Probate #3677, leading to the two orders and decrees entered therein, the first dated January 5, 1967, and the second dated May 29, 1969, (presented for signing June 5, 1969) concerning which appeals were taken from said judgments and decided by the Third District Court of Appeals in 3 Civil 11731 and in 3 Civil 12727.

14. Plaintiffs were represented by counsel of their own choosing in all proceedings had before the Superior Court of the State of California, County of El Dorado, in *Garibaldi, et al., vs. Canvin, et al.,* Action #18717.

15. The issue of the sufficiency of the notices of hearings in Probate #3677 was fully and finally considered and determined by said orders and decrees of the above-entitled Court in Probate #3677 as affirmed by the Court of Appeals in 3 Civil 11731 and in 3 Civil 12727 and by the judgment of the Suprior Court of the State of California, in and for the County of El Dorado, in *Garibaldi, et al., vs. Canvin, et al.,* Action #18717. Those prior judgments, orders and decrees are long since final.

16. The issue of jurisdiction of the Court in Probate proceeding #3677 over the parties and the real property described in Plaintifffs' Second Amended Complaint was fully and finally considered and determined by the above-entitled Court in Probate #3677 and by the Court of Appeals in 3 Civil 11731 and in 3 Civil 12727, and by the judgment of the Superior Curt of the State of California, in and for the County of El Dorado in *Garibaldi, et al., vs. Canvin, et al.,* Action #18717. Those prior judgments, orders and decrees are long since final.

17. The issue of the rendering unto plaintiffs of due process in Probate #3677 was fully and finally considered and

determined by the above-entitled Court in Probate #3677 and by the Court of Appeals in 3 Civil 11731 and in 3 Civil 12727 and by the judgment of the Superior Court of the State of California, in and for the county of El Dorado in *Garibaldi, et al., vs. Canvin, et al.,* Action #18717.

18. The issue of alleged estoppel of defendants in Probate #3677 as asserted by plaintiffs was fully and finally considered and determined by the above-entitled Court in Probate #3677 and by the Court of Appeals in 3 Civil 11731 and in 3 Civil 12727 and by the judgment of the Superior Court of the State of California, in and for the County of El Dorado in *Garibaldi, et al., vs. Canvin, et al.,* Action #18717.

19. The issue of laches and the Statute of Limitations as to the defendants in Probate #3677 was fully and finally considered and determined by the above-entitled Court in Probate #3677 and by the Court of Appeals in 3 Civil 11731 and in 3 Civil 12727 and by the judgment of the Superior Court of the State of California, in and for the County of El Dorado in *Garibaldi, et al., vs. Canvin, et al.,* Action #18717.

20. The Superior Court of Amador County, by its said orders and decrees in Probate #3677, affirmed by District Court of Appeals in 3 Civil 11731 and in 3 Civil 12727, found and determined that there was a settlement and consent to distribution agreement and a supplemental agreement; that is, the Memorandum Agreement and the Supplemental Agreement, Exhibits "A" and "B" to plaintiffs' Second Amended Complaint in Action #7767, and those orders and decrees are now final and conclusive.

21. The District Court of Appeals in 3 Civil 12727 at Page 5 determined that "The heirs had intended the 1962 agreement (the Memorandum Agreement dated October, 1962, Exhibit "A" to plaintiffs' Second Amended Complaint) to govern the division and distribution of all the real and personal properties

irrespective of the judgment in Action #6071 and irrespective of what assets were included or excluded from the estate by that judgment." That judgment is final and conclusive.

22. The validity and effect of the Memorandum Agreement, Exhibit "A" of plaintiffs' Second Amended Complaint in Action #7767 was fully and finally considered and determined by the said orders and decrees of the above-entitled Court, in Probate #3677, and which said orders and decrees were affirmed by the Court of Appeals in 3 Civil 11731 and in 3 Civil 12727 and by the judgment of the Superior Court, El Dorado County, California, in Action #18717. Those prior judgments, orders and decrees are long since final.

23. The intention of the parties as to the Memorandum Agreement, Exhibit "A" of plaintiffs' Second Amended Complaint in Action #7767 was fully and finally considered and determined by said orders and decrees of the above-entitled Court in Probate #3677 and which said orders and decrees were affirmed by the Court of Appeals in 3 Civil 11731 and in 3 Civil 12727 and by the judgment of the Superior Court, El Dorado County, California, in Action #18717. Those prior judgments, orders and decrees are long since final.

24. The circumstances under which the Memorandum Agreement, Exhibit "A" of plaintiffs' Second Amended Complaint in Action #7767 was made were fully and finally considered and determined by said orders and decrees of the above-entitled Court in Probate #3677 and which said orders and decrees were affirmed by the Court of Appeals in 3 Civil 11731 and in 3 Civil 12727 and by the judgment of the Superior Court, El Dorado County, California, in Action #18717. Those prior judgments, orders and decrees are long since final.

25. The issue of performance or claimed lack of performance of the Memorandum Agreement, Exhibit "A" of plaintiffs' Second Amended Complaint in Action #7767 was

fully and finally considered and determined by said orders and decrees of the above-entitled Court in Probate #3677 and which said orders and decrees were affirmed by the Court of Appeals in 3 Civil 11731 and in 3 Civil 12727 and by the judgment of the Superior Court, El Dorado County, California, in Action #18717. Those prior judgments, orders and decrees are long since final.

26. The issue of alleged abandonment or lack of abandonment of the Memorandum Agreement, Exhibit "A" to plaintiffs' Second Amended Complaint in Action #7767 was fully and finally considered and determined by said orders and decrees of the above'entitled Court in Probate #3677 and which said orders and decrees were affirmed by the Court of Appeals in 3 Civil 11731 and in 3 Civil 12727 and by the judgment of the Superior Court in El Dorado County, California, in Action #18717. Those prior judgments, orders and decrees are long since final.

27. The terms of the Memorandum Agreement, Exhibit "A" to plaintiffs' Second Amended Complaint, was fully and finally considered and determined by said orders and decrees of the above-entitled Court in Probate #3677 and which said orders and decrees were affirmed by the Court of Appeals in 3 Civil 11731 and in 3 Civil 12727 and by the judgment of the Superior Court, El Dorado County, California, in Action #18717. Those prior judgments, orders and decrees are long since final.

28. Plaintiffs invoked, and were subject to, the jurisdiction of the above-entitled Court in Probate Action #3677 by the filing by plaintiffs of a verified petition under Probate Code 1080 pleading that a dispute existed between the heirs of Theresa Garibaldi, the parties hereto, as to the distribution of the Estate of Theresa Garibaldi and requesting that the Court order that the assets of the Estate of Theresa Garibaldi be distributed under the terms of the judgment in Action #6071, by

participating in that action, and by asserting various positions in said proceedings contrary to that taken by the Administratrix of said estate.

CONCLUSIONS OF LAW

1. None of the defendants and none of their attorneys did any act or made any representation whatever to plaintiffs, during the times claimed by plaintiffs, in their Second Amended Complaint and their Complaint in Intervention or at any other time, which would constitute any type of fraud, extrinsic or otherwise.

2. None of the defendants and none of their attorneys did any act or made any representation whatsoever to the Court in Amador County Action #6071 or to the Court in Amador County Probate #3677 or to the Court in El Dorado County Action #18717, during the times claimed by plaintiffs, in their Second Amended Complaint and their Complaint in Intervention or at any other time, which would constitute any type of fraud, extrinsic or otherwise.

3. Any controversy or dispute between the parties in the above-entitled action, as to whether the right, title and interest of the parties in the real property described in plaintiffs' Second Amended Complaint and their Complaint in Intervention and their duties in respect thereto is governed by the judgment made by the above-entitled Court in Action #6071 or is governed by orders and decrees made by the above-entitled Court in Probate #3677, was fully, fairly, finally and conclusively considered and determined by the said orders and decrees of the above-entitled Court in Probate #3677 as affirmed by the Third District Court of Appeal in 3 Civil 11731 and 3 Civil 12727; and all of said judgments, orders and decrees are conclusive barring the causes of action in plaintiffs' Second Amended Complaint and in their Complaint in Intervention

under the Doctrine of Res Judicata as to rights of all of the parties hereto in and to the said real property.

4. Any controversy or dispute between the parties in the above-entitled action, as to whether the right, title and interest of the parties in the real property described in plaintiffs' Seond Amended Complaint and their Complaint in Intervention and their duties in respect thereto is governed by the judgment made by the above-entitled Court in Action #6071 or is governed by the orders and decrees made by the above-entitled Court in Probate #3677, was fully, fairly, finally and conclusively considered and determined by the judgment of the Superior Court of the State of California in and for El Dorado County, Action #18717, and said judgment is now final and conclusive barring the causes of action in plaintiffs' Second Amended Complaint and their Complaint in Intervention under the Doctrine of Res Judicata as to rights of all of the parties hereto in and to the said real property.

5. The claim for relief sought by plaintiffs in their Third Cause of Action is barred by the Doctrine of Res Judicata in that all of the issues raised therein have been finally and conclusively determined and resolved by the above-entitled Court in Probate #3677 as affirmed by the District Court of Appeals in 3 Civil 11731 and 3 Civil 12727 as well as by the judgment of the Superior Court of El Dorado County, State of California, Action #18717.

6. The claim for relief sought by plaintiffs in their Fourth Cause of Action is barred by the Doctrine of Res Judicata in that all of the issues raised therein have been finally and conclusively determined and resolved by the above-entitled Court in Probate #3677 as affirmed by the District Court of Appeals in 3 Civil 11731 and 3 Civil 12727 as well as by the judgment of the Superior Court of El Dorado County, State of California, Action #18717.

7. The claim for relief sought by plaintiffs in their Complaint in Intervention is barred by the Doctrine of Res Judicata in that all of the issues raised therein have been finally and conclusively determined and resolved by the above-entitled Court in Probate #3677 as affirmed by the District Court of Appeals in 3 Civil 11731 and 3 Civil 12727 as well as by the judgment of the Superior Court of El Dorado County, State of California, Action #18717.

8. The Superior Court, El Dorado County, California, in its judgment in Action #18717 quieted title in the defendants and against plaintiffs to the real property (Mountain Ranch) described in plaintiffs' Second Amended Complaint and their Complaint in Intervention, the subject of this action. That judgment is now final and conclusive, and the causes of action alleged in plaintiffs' Second Amended Complaint and their Complaint in Intervention are barred thereby under the Doctrine of Res Judicata.

9. Said orders and decrees of the above-entitled Court in Probate #3677, having been affirmed on appeal by the Third District Court of Appeal, 3 Civil 11731 and 3 Civil 12727, are now final and conclusive. Said orders and decrees determined the same issues and facts set out in the causes of action in plaintiffs' Second Amended Complaint and their Complaint in Intervention and bar each of the causes of action alleged therein under the Doctrine of Res Judicata.

Plaintiffs take nothing by way of their Second Amended Complaint and Complaint in Intervention.

Let judgment be entered accordingly.

DATED: October 1, 1975

/s/ John Neblett

Judge of the Superior Court

Supreme Court, U. S.
FILED
APR 28 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-1350

JOSEPH J. GARIBALDI, LEO S. GARIBALDI
and LEONA D. GARIBALDI,
Petitioners,

vs.

EDITH CANVIN, as Administratrix of the Estate
of Theresa Garibaldi, Deceased, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the Court of Appeal of the State of California Third Appellate District

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INTRODUCTION

Respondents pray that the Petition for Writ of Certiorari by petitioners to review the January 5, 1977, judgment of the Court of Appeal of the State of California, Third Appellate District, be denied.

JURISDICTION

Even a cursory review of the provisions of Section 1257(3) of Title 28 of the United States Code readily

discloses that this Court does not, and should not, extend its jurisdiction to review the present final judgment in Garibaldi v. Garibaldi, in the Superior Court of the County of Amador, State of California. Such judgment was affirmed on appeal by the Court of Appeal of the State of California, Third Appellate District. The opinion of said Appellate Court which is referred to by petitioners as a judgment, is Appendix "A" of their petition.

CONSTITUTIONAL PROVISIONS AND STATE STATUTES INVOLVED

Our only quarrel with the Constitutional provisions and the State of California statutes cited by petitioners is that the same are not applicable to this present matter.

STATEMENT OF THE CASE

The opinion of the California Court of Appeal, Third Appellate District contains a more complete statement of facts of this case than as presented by petitioners. (See Appendix "A", ii to viii, of Petition for Writ of Certiorari).

Likewise, the issues presented to the said Appellate Court are more clearly set out therein than in the present Petition. (See Appendix "A" to Petition, page viii).

The last sentence of the Appellate Court's decision clearly establishes the basis of such Court's decision

and that all of the parties had a full and fair hearing at which time their respective contentions were fully presented and ultimately determined.

REASONS FOR DENYING THE WRIT

Petitioners consistently mistake the issues. The basic issue before the California Courts was whether or not petitioners received a full and fair hearing in each of the many prior state proceedings or were they denied same by the alleged fraud of respondents.

The Trial Court found that a full and fair hearing was had by petitioners in those earlier proceedings. Such findings were affirmed on appeal. Petitioners exercised, and were given, their right of appeal for the third time on substantially these same issues.

Petitioners claim they have been denied due process by the Appellate Court. Not once, even to this day, have petitioners asserted that they were denied due process by the Trial Court when its adverse judgment was entered. It is from the judgment of the Trial Court that petitioners appealed. No cry of lack of due process was raised on appeal. It was the judgment of the Trial Court that the Appellate Court fully reviewed and affirmed. The Appellate Court did not deny petitioners the right to be heard on appeal. Such a denial would have denied due process. In affirming the Trial Court's judgment, the only thing the Appellate Court denied was the position taken by petitioners on appeal. Is the receiving of an adverse decision, a denial of due process? If so, every losing

party will automatically become a candidate for review by this Court.

Under 28 U.S.C.A. Section 1257(3) to achieve the right to have their present Petition granted, it must be shown that there is a federal question. It is quite apparent there is no federal question involved in the present case, nor are there any "special and important reasons" for a review by this Court of the Garibaldi judgment. (U.S. Supreme Court Rule No. 19, 28 U.S.C.A.)

The action of the Appellate Court followed a fair trial and there is no claim by petitioners that there was a constitutional issue involved therein. Thus, as stated in *American Ry. Express v. Kentucky,* 273 U.S. 269, 71 L.Ed. 639, 47 S.Ct. 353):

> ". . . We cannot interfere, unless the judgment amounts to mere arbitrary or capricious exercise of power, or is in clear conflict with those fundamental 'principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.'" (cited cases)

The Court further stated in said case that:

> "It is firmly established that a merely erroneous decision given by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law." (cited cases)

The petitioners' request for the review by this Court must be denied for there is no federal issue, constitutional or otherwise; nor is the Trial Court judgment and the affirmation thereof by the Appellate

Court arbitrary or a capricious exercise of power; nor have the rights of petitioners been denied or violated. Petitioners are merely members of the unsuccessful side of a litigated matter of no importance other than to the parties involved therein.

CONCLUSION

In the words of Justice Evans in his Appellate Court opinion:

> "It is hoped and intended by this opinion that a final armistice will be declared as it relates to the battle over the property of Theresa. . . ." (Appendix "A" of Petition for Writ of Certiorari, page xvii)

To such end, we respectfully submit that the Petition for Writ of Certiorari should be denied and the Garibaldi matter finally laid to rest.

Dated, Stockton, California,
April 22, 1977.

Respectfully submitted,
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